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10/823,139	04/13/2004	John C. Oslund	ev31010USD1	4537
9561 7590 08/07/2007 POPOVICH, WILES & O'CONNELL, PA 650 THIRD AVENUE SOUTH SUITE 600 MINNEAPOLIS, MN 55402			EXAMINER EREZO, DARWIN P	
			ART UNIT 3731	PAPER NUMBER
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/823,139  
Filing Date: April 13, 2004  
Appellant(s): OSLUND ET AL.

**MAILED  
AUG 07 2007  
GROUP 3700**

\_\_\_\_\_  
Patrick J. O'Connell  
Terry L. Wiles  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed April 26, 2007 appealing from the Office action mailed October 17, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

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**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 71-73, 75-77 and 79-81 are rejected under 35 U.S.C. 102(e) as being anticipated by US 6,129,739 to Khosravi.

(claim 71) Khosravi discloses a distal protection device comprising:

a guidewire **132**;

a tube **143** having a lumen sized to receive the guidewire;

a filter basket **136** connected to the tube, the filter basket having a closed distal end and an open proximal end; and

a spacing member **135** connected to the tube and positioned proximally of the proximal end of the filter basket, the spacing member being configured to maintain the proximal end of the filter basket in an opened configuration when the device is deployed within the vessel.

(claims 72 and 73) The tube is configured for rotational movement along the guidewire (col. 10, lines 26-27). There is also limited axial movement provided for the tube **143**, which is between the stops **145** and **146**.

(claims 75 and 79) See the rejection to claim 71 and the following: The spacing member is mounted on to the tube and extends outward. Therefore, it is fully capable of engaging a vessel of a body.

(claims 76, 77, 80 and 81) See the rejections to claims 72 and 73.

#### **(10) Response to Argument**

The appellants disagree with the Examiner's position that hoop **135** of Khosravi, which is being interpreted as the claimed "spacing member", is positioned proximally of the proximal end of the filter basket. It is argued that Khosravi teaches a blood permeable sac **136** wrapped around and attached to itself all along its perimeter, creating hem bond **140** and lumen **141**, wherein the lumen is configured to receive spines **137** and **138**. Therefore, the appellants argued that spines **137** and **138**, which forms hoop **135** is not located proximally of the proximal end of the blood permeable sac since the blood permeable sac wraps around said spines. The Examiner disagrees.

The examiner does not dispute the fact that the blood permeable sac **136** of Khosravi does wrap around spines **137** and **138**. However, the examiner is interpreting this blood permeable sac to include two different regions: a first region for "filtering" and a second region for securing the filter to a tube **143**.

As seen in Fig. 11A, the only portion of the blood permeable sac **136** that is capable of filtering is limited to the portion that does NOT include hem bond **140** since

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hem bond **140** is merely used to secure the blood permeable sac to the tube **143**.

Thus, the portion of the blood permeable sac that does not include the hem bond is being interpreted as the "first region" or the claimed "filter basket".

The remaining portion of the blood permeable sac that is hemmed to include spines **137** and **138** is merely being used to secure the blood permeable sac to the tube and also to maintain the proximal end of the "filter basket" in an open position. This portion is being interpreted as the "second region" or the claimed "spacing member".

The appellants argued that there is no evidence that this "second region" is not capable of filtering. However, it is noted that the second region does include spines **137** and **138**, which are disclosed as being formed from nitinol, a shape memory metal. Thus, it would be inherent that the metal spines located within lumen of the second region would block any filtering through said lumen.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

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For the above reasons, it is believed that the rejections should be sustained.

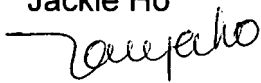
Respectfully submitted,

Darwin Erez

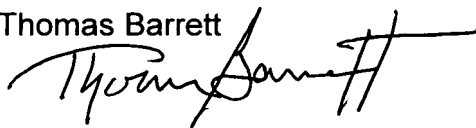
A handwritten signature in cursive script, appearing to read "Darwin Erez".

Conferees:

Jackie Ho

A handwritten signature in cursive script, appearing to read "Jackie Ho".

Thomas Barrett

A handwritten signature in cursive script, appearing to read "Thomas Barrett".